

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROQUE PADILLA,	:	
	:	
Petitioner,	:	Crim. No. 00-12-01
	:	
v.	:	Civ. No. 05-4975
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

**MEMORANDUM**

On March 1, 2000, Petitioner Roque Padilla pleaded guilty to two charges of possession with intent to distribute a controlled substance and one count of conspiracy. He was sentenced to 288 months imprisonment, five years supervised release and \$300 special assessment. On November 6, 2000, Mr. Padilla filed a motion to vacate, set aside, and correct sentence pursuant to 28 U.S.C. § 2255. The motion to vacate was dismissed without prejudice because Mr. Padilla's underlying criminal case was under appeal with the Third Circuit. On September 10, 2002, the Third Circuit upheld Mr. Padilla's judgment of conviction and sentence. Thereafter, on January 8, 2003, Mr. Padilla filed another § 2255 petition. Mr. Padilla was notified that a prisoner generally is limited to one § 2255 petition, and he agreed to proceed with his case. On June 23, 2003, his petition was denied. He appealed to the Third Circuit on July 3, 2003, and his appeal was denied on February 17, 2004.

Mr. Padilla filed the instant Petition for Reduction in Term of Imprisonment on August 8, 2005. He asserted claims under 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 2241. Mr. Padilla was notified on or about August 11, 2005 that the District Court would treat his new petition as an attack on his sentence pursuant to 28 U.S.C. § 2255. Mr. Padilla filed a § 2255 petition in the

proper form on October 11, 2005.

Mr. Padilla's petition will be denied for a number of reasons. First, this court does not have jurisdiction to hear a successive § 2255 petition. Federal law requires that, prior to filing a successive petition, a habeas petitioner must move the Court of Appeals for an order authorizing the district court to hear the petition. 28 U.S.C. § 2244(a). The Court of Appeals Order would certify that the petition included allegations of: "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C § 2255. If the petitioner fails to garner authorization for a subsequent petition from the Court of Appeals, the district court is not required to hear the case. 28 U.S.C. § 2244(a). Here, Mr. Padilla has not moved for authorization from the Third Circuit to file this subsequent § 2255 petition. Therefore, this court does not have jurisdiction over the claim.

Second, even if Mr. Padilla had acquired the requisite authorization from the Third Circuit, he has not pled any cognizable claims. Mr. Padilla claims that he is entitled to a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) due to *United States v. Booker*, 542 U.S. 220 (2005). He does not point to a reduction in the Sentencing Guidelines other than the ruling in *Booker* that the Guidelines are merely advisory. Both the Third Circuit and this court have routinely found that *Booker* was not a reduction in the Sentencing Guidelines, and therefore a claim under § 3582(c)(2) claiming as much must be dismissed. *See, e.g. United States v. Sanchez*, 140 Fed.Appx. 409, 410 (3d Cir. 2005) (non-precedential); *Trader v. United States*, No. 94-534-02, 2005 WL 3263043 (E.D. Pa. Nov. 30, 2005); *United States v. Barnes*, No. 95-349,

2005 WL 217027 (E.D. Pa. Jan. 28, 2005).<sup>1</sup>

Mr. Padilla also challenges his sentence under 28 U.S.C. § 2241, which “confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence.” *Coady v. Vaughn*, 251 F.3d 480, 485 (3d Cir. 2005). Here, Mr. Padilla is challenging the validity of his sentence, not the execution thereof. As a result, his claim is not cognizable under section 2241.

For the foregoing reasons, Mr. Padilla’s petition pursuant to § 2255 will be dismissed. An appropriate Order follows.

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<sup>1</sup> I note further that the Third Circuit has held unequivocally that *Booker* is not to be applied retroactively. *See, e.g. Lloyd v. United States*, 407 F.3d 608 (3d Cir. 2005); *United States v. Swinton*, 333 F.3d 481 (3d Cir. 2003) (applying same analysis when finding *Apprendi v. New Jersey*, 530 U.S. 466 (2000), not retroactive with regard to collateral review). To the extent that Mr. Padilla argues that *Booker* should be applied retroactively, his claim must be dismissed.

**ORDER**

**AND NOW**, this 26th day of January, 2006, after consideration of Petitioner's Petition for Reduction in Term of Imprisonment, and the government's response thereto, it is hereby **ORDERED** that the Motion is **DENIED** without prejudice.

The clerk of court is directed to close this case for statistical purposes.

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/s/  
LAWRENCE F. STENGEL, J.